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No. 87-2130

In the Supreme Court of the United States

OCTOBER TERM, 1988

PAUL NEAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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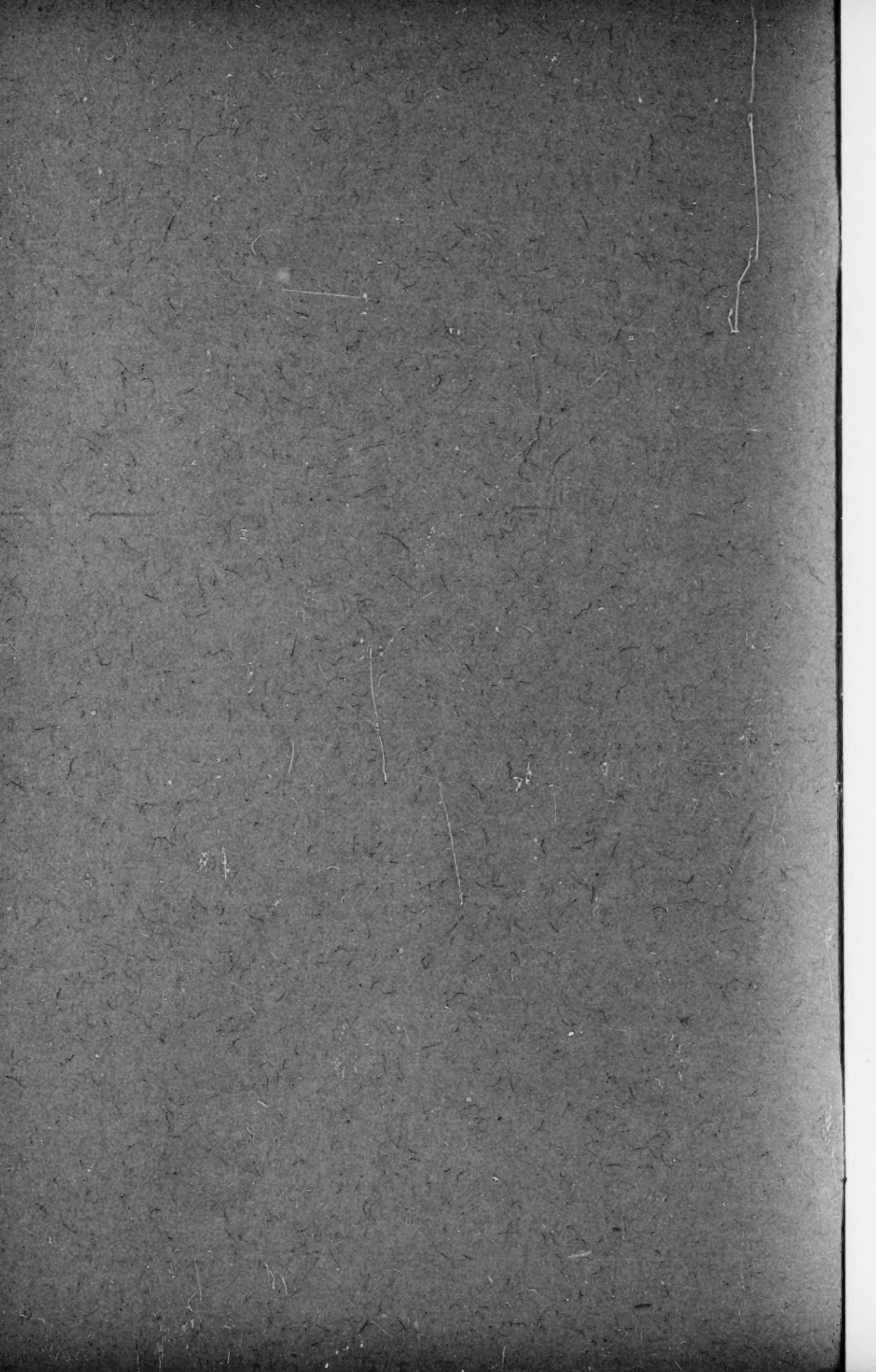
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QUESTIONS PRESENTED

1. Whether the recordkeeping requirements and disclosure provisions of the wagering tax laws, 26 U.S.C. 4401 *et seq.*, violate the Fifth Amendment privilege against compulsory self-incrimination.

2. Whether the evidence was sufficient to support petitioner's convictions for willful failure to pay the special occupational tax imposed by 26 U.S.C. 4411 on persons engaged in the business of receiving wagers, in violation of 26 U.S.C. 7203.

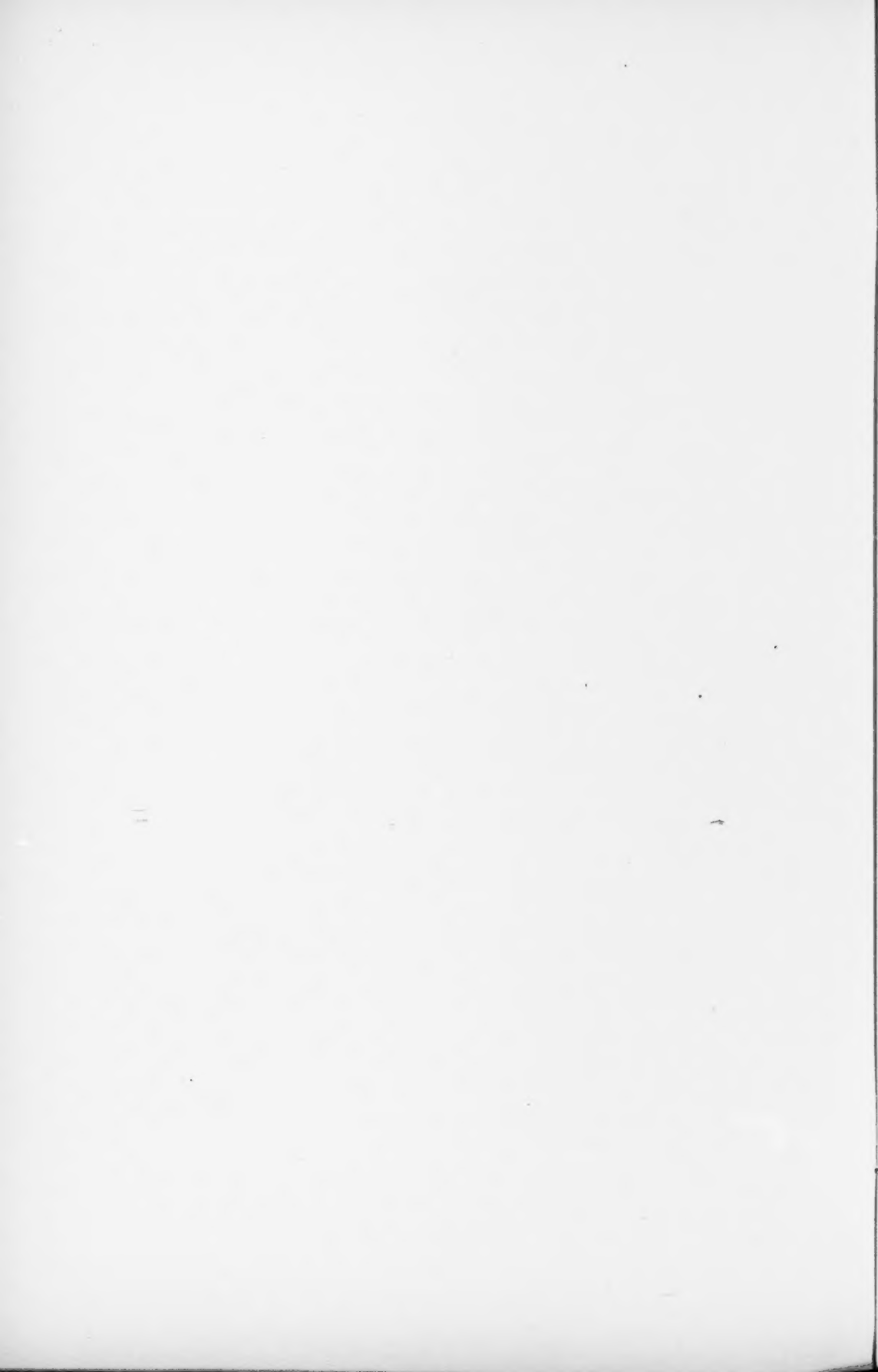


TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	3
Conclusion	7

TABLE OF AUTHORITIES

Cases:

<i>Adickes v. S. H. Kress & Co.</i> , 398 U.S. 144 (1970)	3
<i>Grosso v. United States</i> , 390 U.S. 62 (1968)	5
<i>Marchetti v. United States</i> , 390 U.S. 39 (1968)	5
<i>United States v. Appoloney</i> , 761 F.2d 520 (9th Cir.), cert. denied, 474 U.S. 949 (1985)	5
<i>United States v. Freed</i> , 401 U.S. 601 (1971)	5
<i>United States v. Jeffers</i> , 621 F.2d 221 (5th Cir. 1980)	5, 6
<i>United States v. Lovasco</i> , 431 U.S. 783 (1977)	3
<i>United States v. Merlo</i> , 704 F.2d 331 (6th Cir. 1983)	5
<i>United States v. Sahadi</i> , 555 F.2d 23 (2d Cir. 1977)	5
<i>United States v. Stavros</i> , 597 F.2d 108 (7th Cir. 1979)	5

Constitution and statutes:

U.S. Const. Amend. V	3, 5, 6
Internal Revenue Code (26 U.S.C.):	
§§ 4401 <i>et seq.</i>	3
§ 4401(a)(2)	2
§ 4401(c)	3
§ 4403	4
§ 4411	1, 2, 3, 7
§ 4412	3, 4, 7
§ 4424	4, 6
§ 4424(b)	4, 6
§ 4424(b)(1)	4
§ 4424(c)	4
§ 6103(o)(2)	4
§ 6107 (1964 ed.)	5

IV

Statutes — Continued:

Page

§ 6806(c) (1964 ed.)	5, 6
§ 7203	1, 3, 7
§ 7213 (& Supp. IV)	4
§ 7213(a)(1)	4
18 U.S.C. 1905	4

Miscellaneous:

H.R. Conf. Rep. 93-1401, 93d Cong., 2d Sess. (1974)	6
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OPINION BELOW

The order of the court of appeals (Pet. App. 1a-7a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 1987. A petition for rehearing was denied on March 25, 1988 (Pet. App. 8a-9a). The petition for a writ of certiorari was filed on May 24, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Oklahoma, petitioner was convicted on four counts of willfully failing to pay the \$500 yearly occupational tax imposed by 26 U.S.C. 4411 on persons receiving wagers, in violation of 26 U.S.C. 7203.

Petitioner was sentenced to concurrent terms of one year in prison on each count, fined \$5,000 on each count, and ordered to pay \$3,251.59 as the costs of the prosecution. The court of appeals affirmed (Pet. App. 1a-7a).

1. The evidence at trial showed that petitioner was engaged in the business of accepting wagers on football, basketball, and baseball games from September 1978 through June 30, 1982. Using the alias "Fred," petitioner ran a bookmaking operation from a location outside his home; that location was equipped with a bank of telephones and betting pads. Petitioner "gave no receipts and operated on a cash basis" (Pet. App. 4a). In addition, petitioner used code numbers to identify his bettors and kept his records in code (*id.* at 3a-4a).

The evidence also showed that petitioner failed to file Internal Revenue Service Form 11-C (Pet. App. 10a-11a) and pay the \$500 yearly occupational tax imposed by 26 U.S.C. 4411 for the calendar years 1978, 1979, 1980, and 1981. During that period, petitioner also failed to file Form 730 (Pet. App. 12a), the monthly return that must be filed to pay the two percent excise tax imposed by 26 U.S.C. 4401(a)(2). Pet. App. 5a-7a.

2. On appeal, the court of appeals first rejected petitioner's contention that the evidence failed to establish that he acted willfully when he failed to pay the tax. The court of appeals held that the jury could infer from the evidence that petitioner knew about the requirement to pay the occupational tax and that his failure to do so was intentional (Pet. App. at 4a). The court also rejected petitioner's claim that the government's evidence of nonpayment was so deficient that the record was insufficient to support a finding that petitioner had not paid the tax (*id.* at 7a).

ARGUMENT

1. Petitioner contends (Pet. 7-8, 11-14) that the recordkeeping and disclosure provisions of the wagering tax laws, 26 U.S.C. 4401 *et seq.*, violated his Fifth Amendment privilege against compulsory self-incrimination, because Oklahoma state law prohibits commercial gambling. Petitioner did not raise that argument before either the district court or the court of appeals, and he has therefore not preserved the issue for review. *E.g.*, *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Moreover, petitioner was neither charged with nor convicted of failing to provide the information required to register under Section 4412; he was charged with and convicted of willfully failing to pay the yearly occupational tax imposed by Section 4411, in violation of Section 7203. Thus, petitioner has no basis for raising this constitutional argument on a challenge to his conviction under Section 4411.¹ In any event, even assuming that petitioner may assert the claim, it fails on the merits.

The wagering tax provisions of the Internal Revenue Code impose certain tax obligations and recordkeeping requirements on persons who are "engaged in the business of accepting wagers" (26 U.S.C. 4401(c)). Section 4411 im-

¹ Petitioner asserts (Pet. 7) that any effort to pay the occupational tax without also filing Forms 11-C and 730 would have been futile. For that reason, he suggests, he is entitled to raise his objection to providing the information sought by those forms, even though he was not prosecuted for failing to file the forms or for failing to provide the information required by the forms. Even if his assertion regarding the IRS practice is correct, petitioner has cited no authority to suggest that he could be prosecuted for failing to pay the occupational tax if he tendered payment of the tax without filing the forms or providing the information on the forms that, according to him, poses a risk of self-incrimination.

poses a "special tax of \$500 per year [on all persons] engaged in receiving wagers." Section 4412 requires any such person to register with the district Internal Revenue Service (IRS) director and disclose, among other things, his name, residence, employees' names, and all addresses where he conducts his wagering business. When a bookmaker registers and pays the occupational tax, the IRS issues him a special stamp. In addition, Section 4403 requires each bookmaker to "keep a daily record showing the gross amount of all wagers on which he is so liable."

In addition, the wagering tax provisions contain specific restrictions on the disclosure and use of wagering tax information. The disclosure provision, Section 4424, makes clear that officials and employees of the Treasury Department may not "divulge or make known in any manner whatever to any person" any document, record, or other information supplied by the taxpayer in connection with the wagering tax laws. Such disclosure is permitted only "in connection with the administration or civil or criminal enforcement of any tax imposed by [the Internal Revenue Code]" (26 U.S.C. 4424(b)); information that is disclosed may be used only "in connection with the administrative or civil or criminal enforcement of [the Internal Revenue Code]" (26 U.S.C. 4424(b)(1)); see 26 U.S.C. 4424(c).² Contrary to petitioner's claim, the courts of appeals have unanimously held that this statutory scheme, which severely restricts the government's use and disclosure of

² Disclosure of wagering tax information also falls within the Internal Revenue Code's general provision governing disclosure of income tax return information. See 26 U.S.C. 6103(o)(2). Accordingly, any unauthorized disclosure of information under Section 4424 is a felony punishable by a maximum of five years' imprisonment, a \$5,000 fine, and the costs of the prosecution. See 26 U.S.C. (& Supp. IV) 7213. If the offender is a federal official, he faces the additional penalty of losing his position. See 26 U.S.C. 7213(a)(1). See also 18 U.S.C. 1905.

information submitted by the taxpayer in compliance with the wagering tax laws, is consistent with the Fifth Amendment. *E.g.*, *United States v. Appoloney*, 761 F.2d 520, 523 (9th Cir.), cert. denied, 474 U.S. 949 (1985); *United States v. Merlo*, 704 F.2d 331, 332 (6th Cir. 1983); *United States v. Jeffers*, 621 F.2d 221, 223-226 (5th Cir. 1980); *United States v. Stavros*, 597 F.2d 108, 114 (7th Cir. 1979); *United States v. Sahadi*, 555 F.2d 23, 24-27 (2d Cir. 1977). See also *United States v. Freed*, 401 U.S. 601, 606 (1971) (restrictions on disclosure of firearm registration information to state and local law enforcement officials undermines defendant's claim that registration creates "substantial" and "real" risks of self-incrimination).

Petitioner's reliance (Pet. 8) on *Marchetti v. United States*, 390 U.S. 39 (1968), and *Grosso v. United States*, 390 U.S. 62 (1968), is misplaced. In those cases, the Court held that the wagering tax provisions in force at the time violated the Fifth Amendment, because "the obligations to register and to pay the occupational tax created for [the taxpayer] 'real and appreciable' * * * hazards of self-incrimination" (390 U.S. at 48; see *id.* at 66-67). The Court found that the statute created such "hazards" in several respects. First, 26 U.S.C. (1964 ed.) 6806(c) required a registering bookmaker to display his special tax stamp "conspicuously" in his place of business; if he had no place of business, the bookmaker had to carry the stamp with him and show it upon demand to any Treasury officer. Second, 26 U.S.C. (1964 ed.) 6107 required the district IRS office "to maintain for public inspection a listing of all who have paid the occupational tax, and to provide certified copies of the listing upon request to any state or local prosecuting officer" (390 U.S. at 43). Third, the IRS followed a policy of " 'mak[ing] available' to law enforcement agencies the names and addresses of those who have paid the wagering taxes" (*id.* at 48).

In response to *Marchetti* and *Grosso*, Congress substantially amended the wagering tax laws in order to eliminate the hazards of compulsory self-incrimination. Congress eliminated the requirement in Section 6806(c) that bookmakers display their stamps or produce them upon demand to Treasury officials. Congress also repealed Section 6107 so that local IRS offices would no longer provide wagering tax information to local law enforcement agencies. Finally, as pointed out above, Congress enacted Section 4424, with its specific restrictions upon the disclosure and use of wagering tax information, as part of an effort to "resolve any remaining doubts which may exist under the rationale of the *Marchetti* * * * and *Grosso* * * * cases" (H.R. Conf. Rep. 93-1401, 93d Cong., 2d Sess. 5 (1974)). Thus, as the courts of appeals have uniformly concluded in the cases cited above, the current wagering tax provisions do not violate the Fifth Amendment as interpreted in this Court's decisions in *Marchetti* and *Grosso*.³

2. Petitioner also renews his contention (Pet. 8-11) that the evidence did not show that he willfully failed to

³ Petitioner asserts that the IRS "may not disclose information on wagering tax returns to other law enforcement agencies" (Pet. 12), and that the disclosure made in this case was therefore both improper and an indication that the risk of improper disclosure in general is substantial. Petitioner's premise is wrong. Under Section 4424(b), the IRS may disclose such information to the Department of Justice when, as in this case, the disclosure is made "in connection with the * * * criminal enforcement of [the Internal Revenue Code]". Moreover, contrary to petitioner's statement (Pet. 12), Section 4424(b) unequivocally prohibits disclosure to state law enforcement authorities, because such disclosure would not be "in connection with the administration or civil or criminal enforcement of [the Internal Revenue Code]"; see note 2, *supra*. Finally, petitioner's claim that wagering tax information may be "leaked" to state officials is "too speculative" to constitute a real risk of self-incrimination. *United States v. Jeffers*, 621 F.2d 221, 226 (5th Cir. 1980).

provide tax information in violation of 26 U.S.C. 7203. There are several answers to that claim. First, petitioner was charged with and convicted of willfully failing to pay the yearly occupational tax imposed by Section 4411, in violation of Section 7203; petitioner was neither charged with nor convicted of willfully failing to provide the information required to register under Section 4412. Second, the evidence showed that petitioner was aware of his legal duty to pay the tax because the IRS had given him the necessary forms and petitioner himself had spoken with an attorney about ways to avoid providing the IRS with the information required when remitting the tax (Pet. App. 4a-5a). Third, the evidence also showed that it was common knowledge among bookmakers in the area that they must pay the special occupational tax in order to obtain the tax stamp (Tr. 332, 334-335). The court of appeals thus correctly held that the "evidence as a whole" supported the jury's verdict that petitioner "knew about the stamp tax and conducted his business the way he did to hide his activities from the IRS and avoid paying the tax" (Pet. App. 4a).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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AUGUST 1988